TRENDS IN FEDERAL ANTITRUST DOCTRINE SUGGESTING FUTURE DIRECTIONS FOR STATE ANTITRUST ENFORCEMENT

John J. Flynn*

I. INTRODUCTION

State antitrust policy, in the form of constitutional provisions, statutes, and common law decisions, has been with us for decades.[1] Originally hamstrung by restrictive court decisions fencing off state jurisdiction from commerce that was "interstate,"[2] state antitrust enforcement enjoyed many years of relative slumber with an occasional foray in one or another state where the tradition had been kept alive by an activist Attorney General or a career employee who continued to believe the states had a useful role to play in antitrust enforcement.[3] Occasionally an imaginative lawyer would find a state antitrust statute or constitutional provision useful in private litigation, usually by way of a defense to an action for specific enforcement of a restrictive covenant in an employment contract or sale of a business.[4] On other occasions, state antitrust constitutional provisions were employed by the courts to invalidate state legislation restraining trade or erecting entry barri-

* Professor of Law, College of Law, University of Utah. B.S. 1958, Boston College; LL.B. 1961, Georgetown; S.J.D. 1967, Michigan.

1. *See* H. THORELLI, THE FEDERAL ANTITRUST POLICY 155 (1955); Letwin, *Congress and The Sherman Antitrust Law: 1887-1890*, 23 UNIV. CHI. L. REV. 221 (1956); Limbaugh, *Historical Origins of Anti-Trust Legislation*, 18 MO. L. REV. 215 (1915); Legislation, *A Collection and Survey of State Antitrust Laws*, 32 COLUM. L. REV. 347 (1932).

2. *See* People v. North River Sugar Refinery, 121 N.Y. 582, 24 N.E. 834 (1890), where it was held the commerce clause precluded New York law from reaching out of state corporations involved in a "sugar trust" monopolizing sugar sales in New York. Senator Sherman relied upon this and similar cases in arguing the need for a federal antitrust law to "supplement the enforcement of the established rules of the common and statute law by the courts of the several States in dealing with combinations that affect the industrial liberty of the citizens of these states." 21 CONG. REC. 2457 (1890). *See generally* J. FLYNN, FEDERALISM AND STATE ANTITRUST REGULATION 66-80 (1964).

3. California, New York, Texas and Wisconsin are states frequently cited as having some tradition of enforcing their statutes against local restraints of trade. *See* Moody, *Texas Antitrust Laws and Their Enforcement With Some Reference to Federal Antitrust Laws*, 9 ABA ANTITRUST SEC. REP. 100 (1956); Mostk, *State Antitrust Enforcement and Coordination With Federal Enforcement*, 21 ABA ANTITRUST SEC. REP. 358 (1962); Sieker, *The Role of States In Antitrust Law Enforcement—Some Views and Observations*, 39 TEXAS L. REV. 873 (1961); Note, *The Cartwright Act—California's Sleeping Beauty*, 2 STAN. L. REV. 200 (1949).

4. *See* Goldschmid, *Antitrust's Neglected Stepchild: A Proposal For Dealing With Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193 (1973); Lockhart, *Violation of the Anti-Trust Laws As A Defense in Civil Actions*, 31 MINN. L. REV. 507 (1947); Note, *Defense of Contract Illegality In Contract Actions*, 27 U. CHI. L. REV. 758 (1960). Unlike the federal antitrust counterpart, many older state antitrust laws expressly provided for the defense of contract illegality. For a collection of such statutes, see J. FLYNN, *supra* note 2, at 75-76 n.268.

ers into a specific line of business.[5] Although substantive due process was purportedly dead at the federal level, it found some life in the state courts. At times, in the enforcement of state antitrust policy, substantive due process has been used to hold invalid state mandated regulation fixing prices under the misnomer of "fair trade" laws or arbitrary and unfair licensing restrictions upon entry into a business or trade of a common calling.[6] Despite the occasional uses of state antitrust laws, however, it is safe to say that in most states antitrust enforcement was considered a matter of federal concern and state antitrust enforcement a thing of the past.

Federal antitrust enforcement followed an erratic course over the early decades of its existence but gradually assumed a significant place in the realm of national economic ideology if not policy and has became a principal responsibility of federal law enforcement. While the great depression brought flirtation with wholesale cartelization of the economy as one remedy for what was viewed as the excesses of *laissez-faire*,[7] a pragmatic mixture of increased antitrust enforcement, significant affirmative regulation of some industries, and public ownership characterized the New Deal response to widespread economic distress. In recent years, public enforcement of antitrust policy has been institutionalized to the point of routine prosecution of traditional antitrust violations and has branched out to deal with mergers,[8] foreign trade,[9] and government regulation.[10] Private enforcement in the past two or three decades has exploded as treble damage litigation has become a widespread and lucrative practice, as well as a tool in many cases for rectifying injury resulting from predatory, exclusionary or otherwise adverse competitive harm. For the past two or three decades, federal antitrust enforcement has been of great and growing significance to the bar, the government and those potentially subject to its constraints and penalties.

A less noticed but potentially significant recent development has been the widespread revitalization of state antitrust laws and their enforcement. The gradual realization of the existence of state antitrust statutes and the responsibility of state attorneys general to enforce such statutes has been gaining momentum over the past decade. A number of factors have rekin-

5. *See, e.g.*, General Elec. Co. v. Thrifty Sales, Inc., 5 Utah 2d 326, 339-40, 301 P.2d 741, 750 (1956).

6. *See* Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 MW. U.L. REV. 13 (1958); Paulsen, *The Persistence of Substantive Due Process In The States*, 34 MINN. L. REV. 91 (1950); Note, *Counterrevolution In State Constitutional Law*, 15 STAN. L. REV. 309 (1963).

7. A flirtation found unconstitutional in Schechter Poultry Corp. v. United States, 295 U.S. 495, 549-50 (1935).

8. *See* ANTITRUST DIVISION, DEP'T OF JUSTICE, MERGER GUIDELINES (May 30, 1968), *reprinted in* 360 ANTITRUST & TRADE REG. REP. (BNA) x-1 to x-6 (June 4, 1968).

9. *See* ANTITRUST DIVISION, DEP'T OF JUSTICE ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (Jan. 26, 1977), *reprinted in* J. FLYNN, ANTITRUST SUPPLEMENT 109 (1977 ed.).

10. *See* Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures 177 (1979). [Hereinafter cited as NCRLAP Report].

dled the interest in state enforcement.[11] In part, state involvement as plaintiffs in treble damage litigation under federal antitrust laws has both served to educate state attorneys general to the economic significance of antitrust violations and the legal intricacies of antitrust doctrine and litigation. In addition, it has become apparent that federal enforcement resources are limited and must be devoted to cases of major economic or geographic significance. The urge to displace competition by private agreement takes place regularly in local markets under local circumstances beyond the resources, interest, and, on occasion, jurisdiction of federal enforcement agencies. Frequently, local violations tend to be more blatant and—on occasion—highly predatory. This results, in part, because of a vacuum of continuous local antitrust enforcement by state officials sensitizing local businessmen to the basic requirements of the law.

More recently, the attention of state attorneys general, stimulated by the availability of federal grant funds intended as "seed money" for establishing state antitrust enforcement programs, has been drawn to enforcing state antitrust laws directly in addition to state participation in federal treble damage litigation.[12] Recognition of an independent responsibility to enforce state antitrust statutes has, in many states, raised at least two immediate problems. The first is the fact that many state antitrust statutes are inadequate in substantive scope, jurisdictional reach, enforcement tools and/or remedies.[13] Many state statutes phrase substantive standards in the quaint but vague and underdeveloped language of a bygone era; limit the prohibition of restraints of trade to those involving goods and commodities; provide awkward or inappropriate tools for investigation and discovery, or limit remedies in such a way as to severely restrict the necessary flexibility of prosecutor and court in rectifying or responsibly serving the public interest.[14] The response to this problem has been a widespread movement to reform existing state antitrust statutes, usually closely patterning new state statutes after the federal antitrust statutes, remedies and enforcement devices. Potential conflict is kept at a minimum by closely following federal substantive standards.

The second difficulty encountered in recognizing a responsibility to enforce state antitrust laws is efficient and effective allocation of limited state enforcement resources to achieve the maximum public benefit. At present,

11. *See generally* Wood, *Resurgence of State Antitrust Action: Prices and Public Awareness*, 9 ANTITRUST L. & ECON. REV. No. 4, at 41 (1977).

12. One of the more significant practical results of federal funding has been the increased attention paid to providing high quality backup research for personnel faced with implementing a state antitrust enforcement program. An outstanding and highly useful publication, financed by a Law Enforcement Assistance Administration grant, is R. FELLMETH & T. PAPAGEORGE, A TREATISE ON STATE ANTITRUST LAW AND ENFORCEMENT: WITH MODELS AND FORMS (1978) (reprinted as a Supplement to 892 BNA ANTITRUST & TRADE REG. REP. (Dec. 7, 1978)).

13. *See* Project, *Reviving State Antitrust Enforcement: The Problems With Putting New Wine In Old Wine Skins*, 4 J. CORP. L. — (1979).

14. *See generally* Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653 (1974).

state antitrust enforcement appears to be aimed primarily at participation in treble damage litigation under federal law to recover illegal overcharges to the state and its political subdivisions,[15] at least to the extent permitted by the curious limitations of the *Illinois Brick* doctrine.[16] In addition, many state enforcement programs appear to be directing considerable effort to the prosecution under state law of local price fixing, bid rigging, boycotts, tying arrangements and divisions of markets. What will be suggested here is that state antitrust enforcement programs should also contain as a major component a constructive and ongoing reexamination of state and local regulatory schemes from an antitrust perspective. In the long run, it will be argued, the economic, political and social consequences of a state initiated reexamination of state and local regulation impinging upon the competitive ideal may be of greater significance than the combined consequences of state treble damage activity and prosecution of privately initiated local restraints under state law. In addition, the use of state antitrust enforcement in this area may serve to deter the further evolution of some troublesome and difficult to apply emerging federal doctrines responding to outmoded state imposed barriers to competition and the failure to vigorously enforce state antitrust policy at the local level for many decades.

II. EMERGING FEDERAL DOCTRINES

In at least two areas the federal courts, led by the Burger Court, are developing federal remedies for anticompetitive state regulation or anticompetitive private activity permitted or authorized by state regulatory legislation. The first is the narrowing of immunity for state sanctioned restraints of trade by the gradual dismantling of the *Parker v. Brown* doctrine.[17] The second is a vague, amorphous but growing recognition of economic rights under the rubric of an expanded definition of speech under the First Amendment to encompass advertising and a right to "hear" and the use of federal civil rights legislation to protect economic rights as well as political and social rights. Both developments are troublesome because of the ab-

15. *See* Address by J. Miles, *Current Trends In State Antitrust Enforcement* (Mimeo, before the ABA) (Aug. 8, 1978).

16. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). *See* Miles, *Socking It To Plaintiffs: Supreme Court Antitrust Decisions In The 1976-77 Term*, 12 U. RICH. L. REV. 1 (1977); Schelburg, *Illinois Brick and Consumer Actions: The Passing Over Of The Passing-On Doctrine*, 6 HOFSTRA L. REV 361 (1978); Watson, *Bad Economics In The Antitrust Courtroom:* Illinois Brick *And The 'Pass-On' Problem*, 9 ANTITRUST L. & ECON. REV. No. 4, at 69 (1977); Note, *Restitution: A Solution To* Illinois Brick Co. v. Illinois *and to the Manageability Problems of Antitrust and Other Consumer Class Actions*, 18 ARIZ. L. REV. 940 (1976); Note, *Scaling The Illinois Brick Wall: The Future Of Indirect Purchasers In Antitrust Litigation*, 63 CORNELL L. REV. 309 (1978); Note, Illinois Brick*: An Abuse of Precedent to Circumvent Congressional Intent*, 1977 UTAH L. REV. 501 (1977).

The future of consumer antitrust suits suffered another blow in Reiter v. Sonotone Corp., 579 F.2d 1077 (8th Cir. 1978), *cert. granted* 99 S. Ct. 830 (1979). In that case, the Eighth Circuit held that even *direct* purchasers were precluded from suit, where the purchasers were consumers purchasing for their own consumption, on the theory one must suffer a "commercial injury" to have standing. *Id.*

17. 317 U.S. 341 (1943).

sence of workable standards delineating the scope and direction of the pragmatic goals the federal courts are seeking to achieve; the absence of clearcut ideological signals defining the values which the courts are seeking to implement; the consequences for a number of related fields of law because of the broad generalizations being stated and implemented; and, the complexities engendered in such cases by concerns with principles of federalism.

A. State Action Immunity

Increased federal antitrust scrutiny of activity displacing competition pursuant to state laws that command, mandate, authorize or permit such conduct has taken place recently through assaults mounted against the "state action" exemption. The genesis of the "state action" exemption, *Parker v. Brown*,[18] created a broad umbrella of immunity from federal antitrust policy for conduct which "derived its authority and its efficacy from the legislative command of the state. . . ."[19] For three decades, the aura of *Parker v. Brown* served to immunize a wide range of anticompetitive activity finding some sanction in, association with, or authorization by state or local law.[20] As a result of both judicial abdication of scrutiny of federal regulation vis-a-vis federal antitrust and abandonment of substantive due process review of state economic regulation by federal courts, a wide door for establishing immunity from antitrust policy was established.[21] The determination of economic policy, for good or bad, was vested in legislative bodies—national, state and local—with minimal judicial review. Presumably, establishment of the appropriate balance between competition and regulation would be struck in the political sphere, with courts limited to the function of determining what balance had been struck by the legislature rather than what balance should be struck in the mind of a court.[22]

The accumulation of a wide range of economic regulation at all levels of government has become a growing concern in the antitrust sphere. Much of this regulation has not been the product of a reasoned balance between competition or regulation, but rather reflects special interest political power or *ad hoc* responses to the real, imagined or contrived difficulties of particular industries in a particular time and circumstances.[23] Frequently, the interface between regulation and competition was left vague or unstated, with

18. *Id.*

19. *Id.* at 350.

20. For surveys, see Handler, *The Current Attack on The* Parker v. Brown *State Action Doctrine*, 76 COLUM. L. REV. 1 (1976); Rogers, *The State Action Antitrust Immunity*, 49 U. COLO. L. REV. 147, 151-60 (1978); Slater, *Antitrust and Government Action: A Formula For Narrowing* Parker v. Brown, 69 NW. U. L. REV. 71 (1974). For a broader analysis of the confrontation between antitrust policy and government regulation generally, see First, *Private Interest and Public Control: Government Action, The First Amendment and the Sherman Act*, 1975 UTAH L. REV. 9 (1975).

21. *See* First, *supra* note 20, at 22-25.

22. *See* Ferguson v. Skrupa, 372 U.S. 726, 729 (1963): "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation."

23. *See* NCRLAP Report, *supra* note 10, at 179-85 (1979).

wide discretion vested in the regulator or assumed by the regulatee to define what activity was and was not in the public interest. Although the N.R.A. invitation to cartelization died in its infancy on the altar of substantive due process,[24] many significant industries became cartelized in fact through the creation of industry or government administered entry barriers, licensing restrictions, rate bureaus and conferences, and a host of other limitations and restrictions upon all or some of the activity of the industry.[25] Beginning in the 1960's, however, a growing antitrust presence began to be felt at the federal level in regulatory decision-making. Inquiries into the appropriate scope of federal regulation became more common in antitrust attacks on conduct initiated by private interests claiming immunity by virtue of the presence of regulation. Through both public and private antitrust litigation, the federal courts have been called upon with increasing frequency to reconcile the appropriate limitations for federal regulation and federal antitrust and have gradually built up a presumption in favor of competition except where Congress has expressly or impliedly declared otherwise, with most doubts resolved against a finding of exemption from antitrust policy.[26]

A similar, but more recent and complex process of reexamination of federal antitrust policy and state and local regulation, has been initiated by a series of private antitrust cases calling into question the meaning and future vitality of *Parker v. Brown*. This reexamination is more complex than the primary jurisdiction cases. In addition to establishing the appropriate scope of competition and regulation under broad and vague legislative language presenting a potential clash of economic policy, courts must also consider federalism and the scope of federal judicial interference with state legislation and policy in the economic sphere.

A series of private cases under the federal antitrust laws over the past four years attacking the state action exemption demonstrate the complexity of balancing the conflicting policies involved while attempting to establish a knowable and workable legal standard to guide future adjudication and behavior. In *Goldfarb v. Virginia State Bar*,[27] the claim that "state action"

24. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

25. *See* ADAMS, BUSINESS EXEMPTIONS FROM THE ANTITRUST LAWS: THEIR EXTENT AND RATIONALE IN PERSPECTIVES ON ANTITRUST POLICY 273 (Phillips ed. 1965); W. JONES, REGULATED INDUSTRIES 1-76 (2d ed. 1976); Symposium, *Deregulation And The Antitrust Laws—What It's All About*, 45 ANTITRUST L.J. 194 (1976).

26. A seminal article widely cited and relied upon, questioning the undue judicial deference to the general existence of a regulatory scheme is Schwartz, *Legal Restrictions of Competition In The Regulated Industries: An Abdication Of Judicial Responsibility*, 67 HARV. L. REV. 436, 464 (1954). Thereafter and with increasing frequency, courts were called upon to define the scope of regulation in the context of antitrust litigation. Among decisions refusing to find activity exempt from antitrust policy are Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); California v. F.P.C., 369 U.S. 482 (1962); United States v. R.C.A., 358 U.S. 334 (1959). For a recent survey see Shuman, *The Application of the Antitrust Laws to Regulated Industries*, 44 TENN. L. REV. 1 (1976)

27. 421 U.S. 773 (1975). *See* Branca & Steinberg, *Attorney Fee Schedules And Legal Advertising: The Implications Of* Goldfarb, 24 U.C.L.A. L. REV. 475 (1977); Shores, *The State Action Doctrine After* Goldfarb *and* Cantor, 63 IOWA L. REV. 367 (1977); Note, *The Antitrust Liability Of Professional Associa-*

immunized a bar imposed minimum fee schedule from attack under the antitrust laws was rejected. The court stated the "threshold question" in "determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign."[28] Although the court found the Virginia legislation authorized the Supreme Court of Appeals of Virginia to regulate the practice of law, state action immunity was not available to either the county or State bar because the Virginia court rules governing law practice did not require the anticompetitive conduct in question (price fixing) of either the state or county Bars. Viewing the defendant's arguments as claims that state regulation "prompted" the issuance of minimum fee schedules, the court held "prompting" was insufficient to invoke the state action exemption: "[R]ather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."[29] The court added:

> The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. . . . The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.[30]

Goldfarb, while not purporting to depart from *Parker v. Brown*, clearly indicated a willingness to examine more closely both private conduct lurking in the vicinity of state regulation and whether "quasi-state" regulatory agencies like a bar association with disciplinary authority may itself violate federal antitrust policy in the exercise of that authority.

The degree of state compulsion, the character of the act compelled, and the scope of state agency immunity when state action is a claimed defense to an otherwise unlawful restraint of trade were all explored but scarcely illuminated in *Cantor v. Detroit Edison Co.*[31] Detroit Edison's inclusion of the cost of providing its customers with "free" light bulbs in its filed tariffs with the Michigan Public Service Commission was attacked by a retailer of light bulbs under Sections 1 and 2 of the Sherman Act[32] and Section 3 of the Clayton Act.[33] Six justices agreed that the state agency's general approval of Detroit Edison's overall tariff did not exempt the light bulb exchange pro-

---

tions After Goldfarb: *Reformulating The Learned Professions Exemption In The Lower Courts*, 1977 DUKE L.J. 1047 (1977).

28. 421 U.S. at 790.

29. *Id.* at 791. A parallel evolution in the international sphere has been a similar narrowing of the "Act of State" doctrine and its use as a defense to federal antitrust and other actions. *See generally* Jacobs, King & Rodriguez, *The Act Of State Doctrine: A History of Judicial Limitations and Exceptions*, 18 HARV. INT'L L.J. 677 (1977); Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM. L. REV. 1247 (1977).

30. 421 U.S. at 791-92 (footnotes omitted).

31. 428 U.S. 579 (1976).

32. 15 U.S.C. §§ 1, 2 (1976).

33. 15 U.S.C. § 14 (1976).

gram from antitrust attack. Beyond that general conclusion, consensus on why the program did not constitute exempted state action is difficult to find in the four opinions generated by the controversy. A plurality of four (Justices Stevens, Brennan, White and Marshall) held the defense not available unless the activity was compelled by the state. Compulsion was defined to mean that "the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it."[34] Finding the light bulb program initiated by the utility and not a state agency, the Court apparently discounted state "dominance" in the implementation of the program. The same plurality went further and read *Parker* as only potentially exempting the activities of state officials with responsibility for administering the activity in question. Noting that prior decisions had held that state authorization, approval, encouragement or participation in restrictive private conduct confers no antitrust immunity and that the federal antitrust laws are aimed at the conduct of persons not programs, the plurality left ambiguous the status of private activity pursuant to state command. The plurality stated:

> [T]he narrow holding in *Parker* concerned only the legality of the conduct of the state officials charged by law with the responsibility for administering California's program. What sort of charge might have been made against the various private persons who engaged in a variety of different activites implementing that program is unknown and unknownable because no such charges were made. Even if the state program had been held unlawful, such a holding would not necessarily have supported a claim that private individuals who had merely conformed their conduct to an invalid program had thereby violated the Sherman Act. Unless and until a court answered that question, there would be no occasion to consider an affirmative defense or immunity or exemption.[35]

A majority of six (the plurality plus Burger and Blackmun) appeared to have agreed upon a hybrid analysis interrelating concepts of preemption and primary jurisdiction to develop a methodology for analyzing state compelled or authorized restraints of trade. In response to an argument that "federal antitrust laws should not be applied in areas of the economy pervasively regulated by state agencies,"[36] the majority gave three reasons why the argument was "unacceptable": "First, merely because certain conduct may be subject both to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards."[37] The court's explanation of this reason followed a primary jurisdiction analysis by analogizing to con-

34. 428 U.S. at 594-95. For similar holdings requiring "compulsion" where the violation is claimed to be the product of activities by a foreign nation, see Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. Sisal Sales Corp., 274 U.S. 268 (1926); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

35. 428 U.S. at 601.

36. *Id.* at 595.

37. *Id.*

flicts between federal regulatory policy and federal antitrust policy.[38] Despite telling objections by a powerful dissent suggesting the analogy limped,[39] if it did not fall flat on its face,[40] the majority suggested that a court must follow primary jurisdiction standards "at least as severe as those applied to federal regulatory legislation."[41] If such an analysis disproves any express or implied intent to vest initial or exclusive jurisdiction over the activity in question in the state agency, as the majority found in *Cantor*,[42] the federal antitrust analysis may proceed because there can be no state action defense.

The court's second reason for rejecting pervasive state regulation as a test assumed the existence of inconsistent state regulation and federal antitrust policy but refused to accept the conclusion "that the federal interest must inevitably be subordinated to the State's . . . ."[43] The strong inference that preemption might be the premise of overturning state regulation was picked up and elaborated upon by Justice Blackmun concurring with the plurality.[44] Justice Blackmun argued that such cases should proceed upon a "rule of reason" analysis, including a weighing of the respective state and federal interests. Justice Blackmun found little difficulty with the dispute before the Court, since there was no evidence to support an "adequate state objective"[45] for extending regulation from core natural monopoly aspects of the electric power business to the distribution of light bulbs. Some hint of what might be an "adequate state objective" under this analysis was suggested by Justice Blackmun when he observed: "For all that appears, light-bulb marketing, unlike electric power production, is not a natural monopoly,

38. *Id.* at 595-97, citing Gordon v. New York Stock Exch., 422 U.S. 659 (1974); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Silver v. New York Stock Exch., 373 U.S. 341 (1963); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

39. The Court's analysis rests on a mistaken premise. The "implied immunity" doctrine employed by this Court to reconcile the federal antitrust laws and federal regulatory statutes cannot, rationally, be put to the use for which the Court would employ it. That doctrine, a species of the basic rule that repeals by implication are disfavored, comes into play only when two arguably inconsistent *federal* statutes are involved. "Implied repeal" of federal antitrust laws by inconsistent state regulatory statutes is not only "not favored," . . . it is impossible.

428 U.S. at 629 (Stewart, J. dissenting) (emphasis in original).

40. *See generally* Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 COLUM. L. REV. 1, 12-13 (1976).

41. 428 U.S. at 597.

42. The distribution of electric light bulbs in Michigan is unregulated. The statute creating the Commission contains no direct reference to light bulbs. Nor, as far as we have been advised, does any other Michigan statute authorize the regulation of that business. Neither the Michigan Legislature, nor the Commission, has ever made any specific investigation of the desirability of a lamp-exchange program or of its possible effect on competition in the light-bulb market. Other utilities regulated by the Michigan Public Service Commission do not follow the practice of providing bulbs to their customers at no additional charge. The Commission's approval of respondent's decision to maintain such a program does not, therefore, implement any statewide policy relating to light bulbs. We infer that the State's policy is neutral on the question whether a utility should, or should not, have such a program.

428 U.S. at 584-85.

43. *Id.* at 595.

44. *Id.* at 605.

45. *Id.* at 613.

nor does it implicate health or safety, nor is it beset with problems of instability or other flaws in the competitive market."[46] This sounds like the resurrection of substantive due process, since the judiciary apparently is free to substitute its judgment for that of the state in determining what is an appropriate exercise of the police power.

The majority's third reason for rejecting the pervasive regulation argument operated on the assumption of Congressional intent not to apply the federal antitrust laws to activity primarily regulation by the State. With the ghost of substantive due process lurking in the vicinity the Court seemed to be reserving the right to second-guess the judgment of the State on whether the activity was one which ought or ought not to be regulated. The Court stated:

> [E]ven if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs.[47]

No explanation was given for how one is to distinguish an "essentially unregulated" area from one that is not and who is to make that determination.

The confused state of affairs raised by the implications of the diverse opinions in *Cantor* was scarcely clarified in *Bates v. State Bar of Arizona*.[48] In *Bates*, unlike *Goldfarb*, the proceedings were initiated by the Bar in an effort to discipline two members of the Bar for advertising their services in violation of disciplinary rules adopted by the Arizona Supreme Court. *Goldfarb* was found distinguishable because the activity there was not compelled by the State, while in *Bates* the disciplinary action barring lawyer advertising was found to be both compelled by rules expressly adopted by the Arizona Supreme Court and approved in their application by the Arizona Court in the case before the Court.

The "solace" sought by the defendants in *Bates* from *Cantor*—principally the claim that "the interest embodied in the Sherman Act must prevail over the state interest in regulating the bar"[49]—was denied them. The Court held *Cantor* distinguishable because it did not involve a claim directed against a public official or public agency while *Bates* involved claims against the Arizona Supreme Court and its actions in enforcing the disciplinary rule. The Court characterized the Arizona Supreme Court as the "real party in interest"[50] since it adopted the rules and is the ultimate trier of fact and law in the enforcement of the displinary rule. The named party in interest, however, was the Arizona State Bar. It is conceivable that future litigation may turn on who is the "real party"; for example, in a case like *Cantor*, the state

46. *Id.*
47. *Id.* at 595.
48. 433 U.S. 350 (1977).
49. *Id.* at 360-61.
50. *Id.* at 361.

agency might be presented as an incidental, related or involved party. The Court further distinguished *Cantor* on the grounds that the State had no independent regulatory interest in the market for light bulbs while *Bates* involved the regulation of the activities of the Bar and involved the "core" of the State's duty to protect the public.[51] Other than observing that lawyers are essential to the primary governmental function of administering justice and that there exists a long tradition of extensive state regulation of lawyers, little light was shed on what makes one form of regulation "core" and another not. *Cantor* was further distinguished on the grounds that the anticompetitive activity in *Cantor* was "instigated by the utility with only the acquiescence of the state regulatory commission."[52] As for the restraint in *Bates* the court stated:

> The situation now before us is entirely different. The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior. Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policy maker—the Arizona Supreme Court—in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active.[53]

It may be noteworthy that this rationale did not disclaim authority to review the merits of state regulation through the vehicle of federal antitrust policy but rather deferred to state regulatory authority where it was clearly stated and actively implemented in the context of an area traditionally regulated by the states and of assumed significance to the public interest. Principles of primary jurisdiction appear to underlie such a rationale causing deference to the regulatory scheme, with ancillary issues relating to preemption, substantive due process, or an undue interference with constitutional rights of the regulated[54] remaining to be litigated in cases where the regulation is not traditional or necessary to the public interest when measured on some yet to be articulated standard of what might be an "essentially unregulated" business or a non-"core" area of the business regulated.

The most recent pronouncement on the scope and meaning of state action immunity by the Supreme Court contributed yet more splintered opinions opening new vistas for litigating what the court held, what a majority said and what the court means. In *City of Lafayette v. Louisiana Power & Light Co.*,[55] the Court upheld the assertion of an antitrust counterclaim

51. *Id.*
52. *Id.* at 362.
53. *Id.*
54. As discussed in text accompanying notes 99-108 *infra*, *Bates* involved a second major issue; the question of whether the regulation imposed on advertising by lawyers infringed a first amendment right of "commercial speech" and a first amendment right of recipients of the speech to "hear" the commercial message.
55. 435 U.S. 389 (1978).

against city owned and operated electric utilities. Louisiana cities, authorized by state law to own and operate electric utilities within and without city boundaries, had sued a competing privately owned electric power utility for assorted antitrust violations. The trial court dismissed the private utilities antitrust counterclaim against the cities on the *Parker v. Brown* rationale that the activities of the city operated utilities constituted "state action" immune from the federal antitrust laws. The Court of Appeals for the Fifth Circuit reversed on the basis of *Goldfarb* holding that cities, as "subordinate state governmental bodies," are not ipso facto exempt from the operation of the antitrust laws and that the trial court must consider whether the activity complained of was within the scope of activity contemplated by the state legislature in establishing and delegating authority to the city.[56]

In a plurality opinion, authored by Justice Brennan and joined by Justices Marshall, Powell and Stevens, the fifth circuit was affirmed. Chief Justice Burger concurred in that part of the plurality opinion rejecting the claim that cities ought not be considered persons subject to antitrust liability as defendants although cities should be considered persons entitled to the protection of the antitrust laws as plaintiffs.[57] Relying on primary jurisdiction cases at the federal level, the majority held that implied exemptions from antitrust policy are not to be recognized unless it appears that the antitrust and regulatory provisions are plainly repugnant.[58] Evaluation of the reasons for judicial recognition of an antitrust exemption for "state action" was to be approached in the same way: Is there a conflict between the purposes of antitrust policy and the purposes for exempting state action from federal control through the antitrust laws? The purpose of antitrust policy was identified as the establishment by Congress of "competition as the fundamental principle governing commerce in this country."[59] The purpose of recognizing a state action exemption is rooted " '[i]n a dual system of government in which, under the Constitution, the states, are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.' "[60] The court then cast upon the cities the burden of demonstrating how the policy underlying *Parker v. Brown* was involved in the case before the court and whether it was sufficiently involved to overcome the mandate of Congress that competition govern commerce in this country.[61] The court then proceeded to reject any limitation upon antitrust policy to control the exercise of "private" but not "public" power, since the

56. 532 F.2d 431, 434-35 (5th Cir. 1976). For an analysis of the Circuit Court opinion and other cases involving "proprietary" activities by local governments, see Note, *The Antitrust Liability Of Municipalities Under The* Parker *Doctrine*, 57 B.U.L. REV. 368 (1977).

57. 435 U.S. at 418-26. (Burger, C.J., concurring).

58. *Id.* at 398-99.

59. *Id.* at 398.

60. *Id.* at 400, *quoting* Parker v. Brown, 317 U.S. 341, 351 (1943).

61. "Petitioners' arguments therefore cannot prevail unless they demonstrate that there are countervailing policies which are sufficiently weighty to overcome the presumption." *Id.*

fundamental value of "competition" can be compromised or destroyed by the latter as well as the former.[62] The potential for controlling abuse of the exercise of public power was viewed as wanting, at least in the context of specific anticompetitive behavior alleged in the case; both on the grounds of impracticality and on the grounds that Congress had entrusted the enforcement and evolution of the concept of competition to the administration of "neutral courts" above the political fray and immune from political influence.[63] Noting that in 1972 there were 62,437 different units of local government[64] with broad potential to make economic choices without regard to their anticompetitive effects and thereby opening a "serious chink in the armor of antitrust protection,"[65] a majority refused to find any persuasive or overriding reason for excluding cities from the concept of "person" subject to antitrust liability.

Determining what exactly was held by a "majority," (let alone the plurality) other than the absence of a reason for reversing the circuit court for failure of the cities to provide a persuasive reason to overcome a presumption in favor of competition as a fundamental national policy, is exceedingly complex. Chief Justice Burger and possibly Justice Marshall[66] parted company with the plurality from this point on. The plurality held that it was error to claim "that all governmental entities, whether state agencies or subdivisions of a state, are, simply by reason of their status as such, exempt from the antitrust laws."[67] This is so, claimed the plurality, because *Parker* as applied by *Goldfarb* and *Bates* is limited to the "sovereign" acts of states out of a respect for dual federalism and cities are not themselves sovereign. Thus, the state action doctrine "exempts only anticompetitive conduct engaged in as an act of government by the state as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service."[68] The city must be able to point to some state policy authorizing it to act in the area and "that the legislature contemplated the kind of action complained of."[69]

The plurality's rejection of automatic antitrust immunity for the cities and limitation of state action immunity to sovereign acts mandated by the state acting as sovereign was concurred in by Justices Burger and Marshall. The Chief Justice reiterated the position he stated in *Cantor* that the state

62. *Id.* at 403. A similar approach has been applied to the commercial instrumentalities of foreign governments. See Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2892, (codified at 28 U.S.C. §§ 1601-1611 (1976)); Note, *American Antitrust Liability Of Foreign State Instrumentalities: A New Application Of The* Parker *Doctrine*, 11 CORNELL INT'L L.J. 305 (1978).

63. 435 U.S. at 406-07. A highly questionable assertion of an intent of Congress in conflict with the obvious political actions of the Court.

64. *Id.* at 407.

65. *Id.* at 408.

66. *Id.* at 417 (Marshall, J., concurring); *id.* at 418 (Burger, C.J., concurring).

67. *Id.* at 408.

68. *Id.* at 413.

69. *Id.* at 415, *quoting* City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 432 (5th Cir. 1976).

action exemption was premised on the activity involved, not the identity of the parties to the suit. Under the Burger test, the issue is whether the activity is a proprietary one as opposed to a sovereign activity without regard to whether the activity is engaged in by a city, private actor, or, apparently, the state itself. No clear guidelines are set out for distinguishing between proprietary and sovereign acts, although the Burger opinion intimates that sovereign acts involve "functions essential to separate and independent existence" of the state.[70] In Burger's view, since the "running of a business enterprise is not an integral operation in the area of traditional government functions,"[71] it may be classified a proprietary function. If it were found that the state acting as sovereign mandated the activity, then a further inquiry would be required of the specific actions involved in the antitrust suit. That inquiry, obviously derived from federal primary jurisdiction cases, would involve an analysis of "whether an implied exemption from federal law 'was necessary in order to make the regulatory act work and even then only to the minimum extent necessary.' "[72] Justice Marshall concurred on the understanding that this part of the Burger test incorporated the "core" of the pluralities test; a test Marshall viewed as requiring proof that the state imposed the practices as an act of government, while leaving open an inquiry of whether the activity complained of is more anticompetitive than necessary to effectuate a governmental purpose.[73]

Justices Stewart, White, and Rehnquist dissented;[74] a dissent concurred in, in part, by Justice Blackmun.[75] The dissenters drew a distinction based on the identity of the actors—maintaining that immunity should be extended not only to governmental action generally, but also to activities by private parties mandated by governmental bodies at the state level. Criticizing the plurality's test requiring w proof of compulsion "when the State itself acts through one of its governmental subdivisions" as "senseless"[76] and the Burger distinction between "governmental" and "proprietary" acts as "virtually" impossible to administer,[77] the dissent viewed the decision as "an extraordinary intrusion into the operation of state and local government in this country."[78]

---

70. *Id.* at 423, *quoting* National League of Cities v. Usery, 423 U.S. 833, 845 (1976), *quoting* Coyle v. Oklahoma, 221 U.S. 559, 580 (1911).

71. 435 U.S. at 424. No test was offered for what constitutes "operating a business enterprise," thereby leaving unanswered the antitrust immunity of a host of state agencies and activities like operation of a highway department, employment center, and so on. Perhaps a "business enterprise" is like pornography and one knows one when you see it. *See* Jacobelles v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

72. 435 U.S. at 426.

73. *Id.* at 418.

74. *Id.* at 426.

75. *Id.* at 441. Justice Blackmun did not concur in that part of the dissent suggesting that the majority had reopened a wide ranging judicial inquiry into the substantive merits of state regulation.

76. *Id.* at 432.

77. *Id.* at 433.

78. *Id.* at 434.

One must confess that the narrowing of the state action defense to activities compelled by the state acting in its sovereign capacity, the exclusion from "state action" of the acts of local governments ipso facto except to the extent mandated by the state acting as sovereign, and the clear tendency to analyze state regulation versus federal antitrust on the primary jurisdiction theory developed in cases of conflict between federal regulation and federal antitrust, do lend themselves to an "extraordinary intrusion into the operation of state and local government in this country by the federal judiciary."[79] The splintering of opinions, shifting of majorities and pluralities from case to case, and the failure to establish understandable and relatively workable standards from case to case, all suggest that the Court was aware of these implications of its decisions yet has failed to establish a common ideological beachhead from which to fashion a rational and coherent standard for narrowing the state action exemption. The various opinions have a quality of shoving concepts to and fro, detached from the underlying values thought relevant and sought to be achieved. Lacking any coherence in underlying ideology or common concepts to express the ideology being implemented, one is left to question what it is that is moving the court and where it is going.[80] A brief survey of a related series of cases, equally revolutionary, relying on civil liberties standards to invalidate state regulation of economic activity, will make the educated guess of what is moving the court and where it is going potentially more accurate as well as indicate a necessary and appropriate future role for state antitrust enforcement.

B. Civil Liberties and State Regulation

A parallel line of attack upon anticompetitive state regulation has been developing through an expanded definition of freedom of speech and use of federal civil rights legislation to redress infringement upon rights economic in nature. In *Virginia Pharmacy Board v. Virginia Consumer Council, Inc.*,[81] the Court struck down a Virginia statute prohibiting prescription drug advertising by licensed pharmacists, on first and fourteenth amendment grounds. For the first time, the Court explicitly recognized "commercial speech" as within the ambit of first amendment freedom of speech and recognized a corresponding right and standing to assert the right of recipients of commercial speech to hear the commercial message.[82] The major reason

79. *Id.*

80. Some scholars are seeking to supply a rationale after the fact of decision which may influence the future course of decision-making. *See* Blumstein & Calvani, *State Action As A Shield And A Sword In A Medical Services Antitrust Context:* Parker v. Brown *In Constitutional Perspective*, 1978 DUKE L.J. 389, 414, 419 (suggesting a tenth and eleventh amendment mode of analysis).

81. 425 U.S. 748 (1976).

82. A precursor case, Bigelow v. Virginia, 421 U.S. 809 (1975), reversed a conviction under a Virginia statute making the circulation of any publication to encourage or promote the processing of an abortion in Virginia a misdemeanor. In *Virginia Pharmacy* the Court cited *Bigelow* as the source for "the notion of unprotected 'commercial speech'" all but pass[ing] from the scene." 425 U.S. at 759. *See generally* Jackson & Jeffries, *Commercial Speech: Economic Due Process And The First Amendment*, 65 VA. L. REV. 1 (1979); Meiklejohn, *Commercial Speech And The First Amendment*, 13 CALIF. WEST. L.

for reaching this rather startling conclusion, fraught with countless implications for traditional government regulation of commercial and political activity, appears from the following passage in the Court's opinion:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision making in a democracy, we could not say that the free flow of information does not serve that goal.[83]

No authority was cited which would support the elevation of the Court's preference for a neo-classical model for ordering our economic affairs to the level of a constitutional right belonging to advertisers and their listeners. The consequences of doing so can be profound as the court has enshrined in the constitution through the rubric of commercial advertising being a form of protected first amendment speech, the kernel of an idea that certain trappings of the neo-classical and *laissez-faire* economic system are beyond the legislative pale. A ground for striking down the Virginia regulation, yet avoiding judicial intrusion into the traditional locus of decision-making in this area—legislative action—was clearly available in a preemption analysis.[84] Preemption, however, appears distasteful to the Court's state's rights and federalism concerns and was not alluded to by the Court in its recent series of state action decisions or the development of an expanded meaning for first amendment freedom of speech.

REV. 430 (1977); Note, *First Amendment Protection For Commercial Advertising*, 44 U. CHI. L. REV. 205 (1976).

The exclusion of "commercial speech" from first amendment protection stems from Valentine v. Chrestensen, 316 U.S. 52 (1942). Focusing on the commercial nature of the speech did not easily resolve all cases and the fixed meaning of "commercial" began eroding around the edges. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n On Human Relations, 413 U.S. 376 (1973). The difficulty would appear to reside with the sophistication with which particular judges utilize concepts. To a judge who views concepts as functional tools expressing deeper values of what ought to be, rather than fixed descriptions of reality which can be routinely applied to reality, use of a concept like "commercial" to draw a line about speech which "ought" to be protected in light of the values expressed by the first amendment poses no overwhelming intellectual difficulties. See Cohen, *Transcendental Nonsense And The Functional Approach*, 35 COLUM. L. REV. 809 (1935).

83. 425 U.S. at 765 (footnotes omitted).

84. *See* Note, *The F.T.C. Proposed Regulation Of Prescription Drug Price Disclosure By Retail Pharmacists*, 43 U. CHI. L. REV. 401 (1976); Note, Parker v. Brown: *A Preemption Analysis*, 84 YALE L.J. 1164 (1975). For a general analysis of the Court's recent preemption cases see Note, *The Preemption Doctrine: Shifting Perspectives On Federalism And The Burger Court*, 75 COLUM. L. REV. 623 (1975).

The problems generated by the Court's expansion of first amendment speech rights to include commercial speech do not end with the potential for skewing the allocation of decision-making between the Court and Congress or state legislatures. The Court acknowledged that "commercial speech" within the first amendment is subject to regulation; and, in order to evaluate the justification for the regulation adopted, the Court must make inquiry into the content of the commercial speech in order to weigh the reason for and consequences of the regulation imposed.[85] Of necessity, the Court must evaluate the content of the "speech" made in light of the reasons for and application of the regulation in question; a role the Court has eschewed in prior cases involving free speech.[86] Justice Stewart, concurring in the majority opinion, would uphold the Court doing so in cases of "commercial speech" by drawing a distinction between "commercial price and product advertising on the one hand, and ideological communication on the other."[87] No standards are given for distinguishing between the former and the latter, differences in the degree of protection accorded one of the other, or the degree to which judicial protection of first amendment type values can or ought to involve the courts in second guessing legislative judgments made in the arena of "commercial" speech. The one guiding light in the majority opinion and the Stewart concurrence for evaluating the first amendment validity of regulation of "commercial" speech, appears to be a general equating of *laissez-faire* economic theory with first amendment values. Thus, commercial speech regulation may not interfere with dissemination of information of potential marketplace interest and value and the "flow of accurate and reliable information relevant to public and private decision-making,"[88] but regulation can be used to restrict false and deceptive advertising inimical to the maximum operation of competitive markets.

Only Justice Rehnquist dissented from the Court's recognition of commercial speech as within the ambit of first amendment protections with standing for both "speaker" and "listener" to litigate the validity of regulation and the second class status accorded "commercial" speech as a form of free speech.[89] Noting that there is "nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession,"[90] the dissent concedes that the Court is being more open about the previous test drawing a line between "protected" first amendment speech and utterances not within the first amendment (commercial speech). Rehnquist's problem

85. An implication the Court realized and followed in its most recent commercial speech decision, Friedman v. Rogers, — U.S. —, 47 U.S.L.W. 4151 (Feb. 21, 1979); *see* text accompanying notes 130-32 *infra*. The *Friedman* case substantially narrows the status of "commercial speech" by sustaining state regulation where there is a "possibility" of deception.

86. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1973).

87. 425 U.S. at 779.

88. *Id.* at 781 (Stewart, J., concurring).

89. *Id.* at 781 (Rehnquist, J., dissenting).

90. *Id.* at 784.

with the majority's more forthright consideration of the "difficulties with an effort to draw a bright line" between "protected"[91] speech and that which is not, is that it merely substitutes an equally uncertain line of demarcation ("truthful" commercial speech versus that which is "false" and "misleading"):

> The difficulty with this line is not that it wavers, but on the contrary that it is simply too Procrustean to take into account the congeries of factors which I believe could, quite consistently with the First and Fourteenth Amendments, properly influence a legislative decision with respect to commercial advertising.[92]

Hinted at, but not made explicit, are the fundamental underlying implications of the Court's decision: 1) An alteration of the allocation of decision-making authority in this area between courts and legislatures with an expansion of the former and contraction of the latter; 2) the intrusion of federal court supervision of state legislative and regulatory activity in the regulation of "commercial" speech on Court defined and constitutionally based grounds of validity or invalidity; and, 3) the reliance of the Court on vague and shifting neo-classical economic theories of competition for determining the scope of permissible legislative activity regulating commercial speech under the rubric of traditional first amendment free speech principles. In the areas of state and federal regulation of business or commercial activity arguably within the concept of "speech," the Court's analysis in *Virginia Pharmacy Board* places the Court in the role of "superlegislature to weigh the wisdom of legislation."[93] Disregarding the judicial restraint of otherwise activist judges like Justice Black, ("Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes or some other is no concern of ours")[94] the Court appears to have made the *Wealth of Nations* and modern revisionist interpretations thereof[95] its touchstone for measuring the degree to which the first amendment's protection of "commercial speech" limits legislative authority to regulate "commercial speech."

The *Virginia Board of Pharmacy* erosion of the traditional line between speech that is "ideological" and that which is "commercial" as a basis for excluding judicial review under the first amendment of state and federal economic regulation was reaffirmed by a unanimous Court, with Justice Rehn-

---

91. *Id.* at 781.
92. *Id.* at 787.
93. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).
94. Ferguson v. Skrupa, 372 U.S. 726, 732 (1963).
95. *See* R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978). Judicial activism in this area, by expanding access to the federal courts to challenge state regulation inconsistent with conservative economic thinking and corporate economic interests, is consistent with the Court's activism in limiting access to the Courts in other areas. *See* Morrison, *Rights Without Remedies: The Burger Court Takes The Federal Courts Out Of The Business Of Protecting Federal Rights*, 30 RUTGERS L. REV. 841 (1977). In both cases the Court is implementing its political views of what values are entitled to protection and what values are not entitled to protection. In this sense the Burger Court is no less activist than the Warren Court but appears less competent in implementing its activism.

quist not participating, in *Linmark Associates, Inc. v. Wellingboro*.[96] In *Linmark*, a challenge was posed to a municipal ordinance prohibiting the posting of "For Sale" or "Sold" signs on real estate in the community, ostensibly to stem "the flight of white homeowners from a racially integrated community."[97] Noting the abandonment of the "commercial speech" exception to the first amendment by *Virginia Pharmacy Board*, the Court found the ordinanace an invalid regulation of first amendment free speech. Rejecting the claim that the ordinanace differed from the total ban involved in *Virginia Pharmacy Board* because it did not bar alternative means of advertising, the Court viewed the ordinance as an attempt to regulate the content of the communication. Absent disagreement on the merits of the ordinance objectives—to prevent panic selling and promote a stable and racially integrated community—the Court held the ordinance invalid as lacking a demonstrated connection between the goal sought and the means used—maintaining a stable integrated community by banning lawn signs on properties for sale. In effect, the Court established a presumption against regulation of "commercial speech" if there were any other means to achieve the legitimate goal motivating the regulation. In language further equating "commercial" speech with "ideological" speech, the Court noted that the ordinance "acted to prevent [the community's] residents from obtaining certain information"; information which pertains to real estate sales activity in the community; and, information which "may bear on one of the most important decisions . . . [citizens] have a right to make: Where to live and raise their families."[98] *Linmark* appeared to narrow any distinction between regulation of "commercial" and ideological speech by establishing a presumption against the validity of regulation in either case. Left vague, uncertain and unpreditable was what evidence will serve to overcome the presumption of invalidity against commercial speech regulation and the degree to which evaluation of such evidence will admit to a balancing process in all first amendment speech cases, including ideological and commercial speech. The Court is then left in the role of asserting its values as the appropriate standard for defining the scope of regulation.

Following hard on the heels on *Linmark*, but with far less unanimity among the members of the Court on the commercial speech issue was *Bates v. State Bar of Arizona*.[99] The Arizona Supreme Court adopted and enforced ban on lawyer advertising in Arizona, held immune from Sherman Act analysis under the judicially created state action exemption,[100] also required analysis under the court's evolving expansion of free speech to in-

96. 431 U.S. 85 (1977).

97. *Id.* at 86. *See generally* Comment, *"For Sale" Signs, Blockbusting And the First Amendment: A Tale of Two Cities*, 72 NW. U.L. REV. 789 (1977).

98. 431 U.S. at 97.

99. 433 U.S. 350 (1977). *See* Student Project, *Attorney Advertising:* Bates' *Impact On Regulation*, 29 S.C.L. REV. 457 (1978); Note, Parker v. Brown *Revisited: The State Action Doctrine After* Goldfarb, Cantor, *and* Bates, 77 COLUM. L. REV. 898 (1977).

100. *See* analysis in text accompanying notes 78-80 *supra*.

clude commercial speech. Justice Blackmun, writing for a five member majority (Burger, Powell, Stewart and Rehnquist dissenting) held the ban an invalid impingement of first amendment protected "commercial speech," but appeared to do so with hesitancy and great care. Professing to see the issue presented as a narrow one limited to a prohibition upon "the prices at which certain routine services will be performed,"[101] the majority proceeded to evaluate the merits of the justifications offered for the restriction of price advertising. In an opinion reading like a legislative committee report, the majority proceeded to reject each of the proferred justifications for the ban on price advertising.[102] Revitalizing the second class status for "commercial speech" under the first amendment, the majority refused to indulge in a presumption of invalidity or in the application of an "overbreadth" standard traditionally employed in cases testing regulation of ideological speech.[103] Rather, the Court proceeded to examine claims that the specific advertising in question was false and misleading, because the nature of law practice precludes the offering of "standardized" prices even for routine services. These claims were found unpersuasive on the record and hence insufficient to show the "commercial speech" involved was false or misleading.[104]

In even less persuasive and scarcely analytical opinions, Justices Burger, Powell and Stewart, sought to distinguish *Virginia Pharmacy Board* from *Bates* on the grounds that the former involved professional services related to the sale of standardized prepackaged products, while the inherent nature of the services required in the practice of law varied from case to case even in areas of fairly routine legal matters like no-fault divorce, adoptions, name changes, and individual bankruptcies.[105] Without reexamining the underlying assumptions and methodology of *Virginia Pharmacy Board* other than to note differences in the services provided by the professions involved, the Burger and Powell-Stewart opinions lack a coherent and reasoned basis for fashioning a *judicial* standard for distinguishing constitutionally permissible regulation of commercial speech from that which is not, unless the Court's to be plunged even further into a legislative inquiry into the nature of the business regulated as well as the means chosen to regulate. Expressing a preference for "self-regulation"[106] over what the Burger-Powell-Stewart dissenters claimed were the "imposition of hard and fast constitutional rules as to price advertising,"[107] the dissent authored by Justice Powell appears to be bottomed on an ad hoc distinction that what is constitutionally protected speech for pharmacists and their customers is not constitutionally

101. 433 U.S. at 367-68.
102. *Id.* at 368-79.
103. *Id.* at 380.
104. *Id.* at 381-82.
105. *Id.* at 386 (Burger, C.J., concurring in part and dissenting in part); *id.* at 389 (Powell, J., and Stewart, J., concurring in part and dissenting in part).
106. 433 U.S. at 402.
107. *Id.* at 403.

protected speech for lawyers and their clients. Justice Rehnquist filed a separate dissent, because:

> I would join [Justice Powell's] opinion except for my belief that once the Court took the first step down the "slippery slope" in *Virginia Pharmacy Board*, . . . the possibility of understandable and workable differentiations between protected speech and unprotected speech in the field of advertising largely evaporated. Once the exception of commercial speech from the protection of the First Amendment . . . was abandoned, the shift to case-by-case adjudication of First Amendment claims of advertisers was a predictable consequence.[108]

The ideological thrust behind the Court's departure from traditional free speech analysis in order to limit or strike down anticompetitive state regulation banning or severely restricting "commercial speech" appears to be the same as that behind the Court's narrowing of the state action exemption from federal antitrust policy. In both areas, the Court is implementing its economic ideology in favor of free trade and competition. Under such an analysis, government regulation is viewed as the principal culprit standing in the way of the bounty that conservative neo-classical theory assumes will be realized by maximizing *laissez-faire* and minimizing government interference with the market. Yet the means chosen to reach the Court's ideological end in both the state action line of cases and the commercial speech cases are obtuse and clumsy. They fail to define a recognizable and predictable standard by which regulation may be fashioned and implemented, existing conduct can be rationally litigated and future conduct lawfully planned. In the commercial speech cases the use of the first amendment to eliminate overly broad or anticompetitive state regulation interfering with the making of informed market judgments, as wise and desirable as that may be from an economic or political view, can also dictate or facilitate even more far-reaching consequences than a rebirth of a mode of discredited substantive due process analysis. For example, the Court had little difficulty, despite the absence of concrete precedent for the decision, in vesting in all corporations full first amendment rights of free speech as a means for invalidating state statutes seeking to regulate corruption of the political processes by restricting the expenditure of corporate funds on political issues not directly effecting corporate interests.[109] The Court chose to frame the issue as one where state regulation amounted to "an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication."[110] The fact that the "spokesman" and the "speaker" (a corporation) has neither

108. *Id.* at 404-05.
109. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). *See also* 4 J. CORP. L. 460 (1979).
110. *Id.* at 784.

tangible form, vocal cords or a "soul"[111] did not deter the court in hypostatizing the corporation and vesting in the "thing" created the fullest flower of humanoid rights to voice "its" opinions in the political sphere with corporate funds.

It is also interesting to note that the Court has been amenable to the use of other devices by which federal court jurisdiction may be invoked to strike down anticompetitive state regulation. In *Gibson v. Berryhill*,[112] the Court upheld the use of section 1983 of the Civil Rights Act of 1871,[113] to enjoin administrative proceedings by the Alabama Board of Optometry invoked to suspend or revoke licenses of several optometrists practicing in Alabama. Board proceedings, pursuant to state statutes establishing the Board, requiring licensing of optometrists and defining ethical standards for optometrists enforced by license revocation or suspension, were initiated against optometrists working for corporations engaged in dispensing glasses. Membership on the Board was limited to optometrists in solo practice in competition with optometrists working for corporations. The trial court found that the optometrists cited for disciplinary proceedings would be denied due process by proceedings before the Board because the Board was biased by prejudgment and pecuniary interest on the issues it was charged with deciding.[114] The obvious source of the bias, prejudgment and pecuniary interest of the solo practitioner Board members was the opportunity to exclude the competition of corporations dispensing eyeglasses and that of the optometrists who worked for corporations, nearly half of all optometrists practicing in Alabama.

The Supreme Court upheld use of section 1983 for these purposes and federal court authority to grant an injunction against pending state administrative proceedings before the Board. In rejecting arguments that the anti-injunction statutes, exhaustion of administrative remedies and principles of comity should stay the federal judicial hand, the Court upheld the use of section 1983 to attack state economic regulation through an agency "incompetent by reason of bias to adjudicate the issues pending before it."[115] The record before the Court clearly supported the finding of bias and a misuse of

111. *See* W. BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND ch. 18 (6th ed. 1774); Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1, 6 (1928). "Thingifying" the corporation has progressed steadily away from the common law recognition of the corporation as an artificial legal entity existing only in the mind of the law. *See* Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576-80 (1949) (Douglas, J., and Black, J., dissenting). Perhaps the Burger Court is now prepared to recognize that it (the corporation) has other "rights" like freedom of association, *see* Bell v. Maryland, 378 U.S. 226 (1964), and give legal sanction to the economic reality of the dominance of the corporation in modern life. *See* A. HOCKER, THE CORPORATION TAKEOVER (1964).

112. 411 U.S. 564 (1973).

113. 42 U.S.C. § 1983 (1976).

114. Berryhill v. Gibson, 331 F. Supp. 122 (D. Ala. 1971). Prior to Supreme Court consideration of the case, the Alabama Supreme Court had held, in proceedings against the corporate employer of optometrists involved in the Supreme Court case for practicing without a license, that nothing in Alabama law prohibited a licensed optometrist from being employed by another in examining eyes for the purpose of prescribing eyeglasses. *See* Lee Optical Co. v. State Bd. of Optometry, 288 Ala. 338, 261 So. 2d 17 (1972).

115. 411 U.S. at 577

state regulatory authority for the personal benefit of the regulators. While the use of section 1983 jurisdiction in such circumstances is defensible, it is the willingness of the Court to sanction federal intervention at an early stage of the state proceeding that is worthy of noting here. The pursuit of the Court's vision of markets free of arbitrary or unnecessary state regulation may justify federal intervention well before the validity of the regulation in question has been fully explored in state court proceedings.

C. The Implications For State Antitrust Enforcement

The Court's pursuit of an economic vision of the appropriate balance between competition and regulation, through a narrowing of state action immunity, expansion of free speech and use of the Civil Rights Act to curb arbitrary state economic regulation with an emphasis upon competition over regulation, has been proceeding apace at the federal level. Increased activity by the federal antitrust enforcement agencies in industries regulated and before the agencies engaged in that regulation have sensitized federal courts to the economic values of competition wherever possible and the necessity for careful examination of the legislative scheme of regulation whenever an exemption is claimed for conduct otherwise contrary to the competitive ideal. Some federal regulatory agencies have even become sensitized to the values of competition and the potential for viewing competition as a regulatory tool or at least as a basis from which to reexamine the assumptions of a regulatory scheme laid down many years before in different times and circumstances.

However, when federal court jurisdiction and federal antitrust policy are brought to bear on state and local regulation the issues become considerably more complex by concerns for federalism, fears of federal judicial revivial of substantive due process and the bewildering array of fragmented state and local regulation frequently enacted with less than a coherent social or economic goal in mind and no legislative or administrative record of the reasons for regulation. Indeed, these would appear to be the primary reasons for the Court's failure to articulate a coherent, consistent and acceptable standard for defining a state action exemption from the federal antitrust laws and a willingness to expand first amendment free speech concepts to commercial speech despite the serious political and social implications of doing so.

Criticism of the intellectual quality, skill and direction of the Court's opinions in these areas to one side, the response of state attorneys general to these developments should be a creative one rather than carping criticism about an invasion of state's rights. Furthermore, simply ignoring the ongoing evolution of federal law in these areas will not remedy the situation. In each of the cases discussed above, the wisdom and economic justification of the state regulation giving rise to the controversy were open to serious question. There is little evidence, however, that the state regulation in the area,

directly involved, or mandating the conduct in question had been consciously evaluated from an economic view when originally put in place, was continuously reassessed by responsible state policy makers, or was seriously weighed in light of state antitrust policy by those responsible for enforcement of state antitrust laws either before or once controversy broke out.[116] All three activities are appropriate and necessary responsibilities for a worthwhile state antitrust enforcement program. In this way, rather than being faced with an unclear record of what is the scope of, rationale for, and source of regulation claimed to be state action as in *Cantor*, or the degree to which a state wishes to socialize or should be permitted to socialize certain activity of its agencies under the commerce and supremacy clauses of the United States Constitution as in *City of Lafayette*, federal antitrust litigation against conduct where a claim of state action compelling the conduct is made will at least have a better definition of the purpose and scope, if any, of the state's interest in the matter. Since the Court also appears willing to engage in a balancing process in its development of first amendment "commercial speech" rights, state restrictions upon such speech must apparently be better supported with economic justifications than was the case with the restrictions in *Virginia Pharmacy Board* and *Bates* if the regulation is to withstand a first amendment challenge in federal court. Participation by those with state antitrust enforcement responsibilities in such cases should considerably sharpen the issues presented for decision and minimize the tendency of the courts to substitute their judgment for what the objective of state regulation is and what its competitive impact might reasonably be expected to be. More importantly, such participation might reasonably be expected to show that a substantial amount of state regulation or private action pursuant to a state regulatory scheme, either in its means or ends, is unnecessary, unwise, counterproductive, outmoded, or contrary to the public interest, and thereby insure a speedy resolution of the dispute *sans* further action by the Burger Court engendering further confusion. By the same token that regulation which is necessary or in the public interest can be clearly identified as such, and the rationale for the regulation and its scope can be clearly delineated in case of antitrust or commercial speech litigation seeking to overturn or circumscribe the regulation imposed.

It is here that an active state antitrust enforcement program can make a singular contribution. By serving as a voice within all levels and modes of state government for a policy of competition with responsibility for questioning the need for, and scope of, departures from such a policy, and as a source of opposition to private attempts to use an aura of state governmental action as a cloak for anticompetitive conduct, state antitrust enforcers can begin to bring a long overdue antitrust presence to regulation at the state and local level.

116. Only *Bates* directly involved direct participation by the major branch of state government responsible for the regulation in question; and then, primarily in the context of traditional ethical considerations governing advertising by lawyers.

There would appear to be substantial reasons for allocating a significant portion of a state antitrust enforcement program to review of state and local economic regulation by occupational licensing laws, advertising and other restrictions upon ongoing business activities, the granting or denial of public franchises, state preference laws in public purchasing, public utility regulation, the proprietary activities of state and local government agencies, the delegation of public power to private groups to regulate group or industry behavior, and the bewildering array of other state intrusions into economic affairs in general or the activities of particular lines of business.[117] As the review of recent Supreme Court activity in the state action, commercial speech, Civil Rights Act area suggests, the federal courts are beginning to reexamine the validity and scope of state regulation by means that are less than satisfactory and usually on records with little or no input by the state as to its purposes and objectives, if any, in the regulation. Early intervention in such proceedings by state antitrust enforcement officials may serve to better define the scope and purpose of the state regulation involved, deter claims of state compulsion or sanction for the activity in question, and limit the perceived necessity of federal courts to further define state action and commercial speech or at least provide a clearer platform for weighing the competing values involved than those articulated to date by the Burger Court.

A second reason for active state antitrust involvement in examining the adoption and operation of state and local regulatory schemes is that many of them are unnecessary, poorly administered, or contrary to the consumer's interest. Studies of state and local regulation of economic activity usually note the existence of a confused and tangled mass of regulation accumulated over several decades of legislating. For example, it is reported that in some states occupational licensing laws require that "bee keepers, embalmers, lightening rod salesmen, septic tank cleaners, taxidermists and tree surgeons must obtain official approval before seeking the public's patronage."[118] Codes of ethics, self-administered or subject to loose supervision by a state regulatory authority often dominated by members of the regulated "profession," frequently restrict the otherwise legitimate competitive activity of members of the trade for reasons other than protection of the public inter-

117. Few systematic and broad-based surveys have been undertaken with a view toward describing and assessing the economic and social impact of state and local regulation. The Council of State Government's survey, OCCUPATIONAL LICENSING LEGISLATION IN THE STATES (1952), still remains a primary source for gaining some insight into the range and complexity of state regulation, at least of the occupational licensing variety. For a general survey of a variety of state and local regulation which may be open to question when viewed in light of antitrust principles, see Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation*, 39 ANTITRUST L.J. 950 (1970). A further source of information on the scope and impact of state regulation may be forthcoming by the process mandated by "Sunset Legislation" in the twenty-six states which have passed such laws. *See* Price, *Sunset Legislation In The United States*, 30 BAYLOR L. REV. 401 (1978). *See also* Note, *State Buy-American Laws—Is There A Judicial Solution?*, 31 VAND. L. REV. 1425 (1978).

118. Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976). *See also* B. SHIMBERG, B. ESSER & D. KRUGER, OCCUPATIONAL LICENSING: PRACTICES AND POLICIES 16-192 (1973).

est.[119] Entry limitations in the form of testing or other requirements may be vaguely justified in the abstract as a means for protecting the public from incompetent or dishonest practitioners of an art or trade but are abused in application where used to limit the number of those engaged in the trade for the sake of restricting competition.[120] Undoubtedly the regulation of entry and ongoing business practices in many trades may be justified, but each such scheme of regulation and its administration should be subject to periodic review from a viewpoint of whether the regulation is required in view of its impact on the competitive ideal and if so what should be the scope of regulation and the most objective way to achieve the legitimate public interest goals requiring some regulation.

A third reason for reexamining regulation is the costs imposed by regulation in the form of higher prices and reduced output than would otherwise pertain in a competitive market. No overall price tag has been placed on state and local regulation substituting control for competition. Several studies of federal regulation, however, suggest that the ultimate consumer cost of unnecessary regulation can be quite substantial. The *Report of The National Commission For The Review of Antitrust Law and Procedures* stated:

> It is clear that existing antitrust immunity and regulatory schemes result in significant economic costs. A sampling of some of the more authoritative studies demonstrates the costs of anticompetitive regulation. A General Accounting Office study pegged the cost of air transport regulation at almost $2 billion a year. Various students of the trucking industry have found that regulation costs nearly a billion 1969 dollars annually, with trucking rates being infalted by 5 to 10 percent. Estimates of the impact of the Federal Maritime Commission's Regulation of ocean shipping have shown rates may be as much as 45 percent higher than they would be under competitive conditions. The federal milk marketing order system, just one component of total farm regulation, was estimated by various methods to cause a dead weight social loss of $100 million annually, as well as inducing an income

119. *See* Canby & Gellhorn, *Physician Advertising: The First Amendment and the Sherman Act*, 1978 DUKE L.J. 543, 554-57.

120. It has been reported for example, that the Florida Construction Industry Licensing Board in 1973, rejected all 2149 license applicants and that the Colorado Shorthand Reporters Board certified only 3 of 84 applicants in 1975. Price, *supra* note 117, at 407 n.48. Several surveys of occupational licensing restrictions in diverse fields have been appearing in recent years, exploring the economic and legal implications as applied to specific trades, businesses or professions. *See* Bradley, *The Challenge to Occupational Licensing Laws For Funeral Directors By Direct Cremation Businesses: An Examination and Proposed Solutions*, 5 FLA. ST. U.L. REV. 381, 387-91 (1977); Fulda, *Controls of Entry into Business and Professions—A Comparative Analysis*, 8 TEX. INT'L L.J. 109, 110-36 (1973); Kern, *State Regulation of Social Work*, 10 VAL. U.L. REV. 261, 261-69 (1976); Leffler, *Physician Licensure: Competition and Monopoly in American Medicine*, 21 J.L. & ECON. 165, 172-85 (1978); Shepard, *Licensing Restrictions and the Cost of Dental Care*, 21 J.L. & ECON. 187, 191-200 (1978); Note, *Due Process Limitations On Occupational Licensing*, 59 VA. L. REV. 1097, 1097-1129 (1973); Comment, *Procedural Due Process and the Separation of Functions in State Occupational Licensing Agencies*, 1974 WIS. L. REV. 833, 836-62; Comment, 41 MO. L. REV. 66, 66-78 (1976).

transfer of another $200 million per year.[121]

Elsewhere, the Report summarizes recent deregulation efforts at the federal level and the consequences for consumers. For example, the Securities Act Amendments of 1975 ended the system of fixed brokerage commission rates in stock transactions. By 1977, institutional brokerage rates were reported to have dropped more than forty-five percent and individual rates by fifteen percent. Consumer savings on commission rates, in 1976, were estimated to have reached $700 million.[122] Deregulation of entry restrictions and rate-making for air cargo carriers has resulted in a wide spreading of rates and an expansion of service, while CAB flexibility on fares in the direction of a substantial loosening of fare regulations is reported to have had the impact of "lower prices, record numbers of new passengers, and skyrocketing industry earnings."[123]

Scattered studies of individual industries and specific types of regulation have been done at the state and local level. For example, state regulation prohibiting price advertising for eyeglasses has been estimated to result in a twenty-five percent to more than one-hundred percent increase in the price paid for glasses.[124] Entry and other restrictions in such endeavors as taxi transportation appear to have similar effects,[125] while delegation of regulatory authority to a business or trade is an open invitation to raise prices, restrict entry and limit output.[126] Even though many forms of regulation may still be deemed necessary in particular endeavors in the face of increase consumer costs, evaluating proposed or existing regulation and the form it takes from a consumer cost viewpoint may serve to suggest regulatory goals may be achieved by less restrictive means or that the costs of regulation far outweigh any perceived consumer benefit.[127] The long-run consumer benefits of active state attorney general antitrust participation in all forms of state and local regulation may well prove of greater economic significance to consumers than either state or *parens patriae* treble damage activity under federal law of the prosecution of local conspiracies in restraints of trade under the state antitrust law.

A fourth reason for the active participation of a state antitrust enforcement program in the adoption, implementation, ongoing operation and periodic review of state and local regulation, is the continued vitality of some federal antitrust immunity for unjustified anticompetitive activity under the

121. NCRLAP Report, *supra* note 10, at 181-82 (1972).

122. *Id.* at 184.

123. *Id.* at 184-85.

124. Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & ECON. 337, 344 (1972).

125. *See* Eckert, *The Los Angeles Taxi Monopoly: An Economic Inquiry*, 43 SO. CAL. L. REV. 407 (1970); Kitch, Isaacson & Kasper, *The Regulation of Taxicabs in Chicago*, 14 J.L. & ECON. 285 (1971). *See also* Shepard, *Licensing Restrictions and the Cost of Dental Care*, 21 J.L. & ECON. 187 (1978).

126. For an excellent study documenting the tendency of the self-regulated to regulate in their own interest, see Havighurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 DUKE L.J. 303 (1978).

127. *See generally* Baker, *Competition and Regulation:* Charles River Bridge *Recrossed*, 60 CORNELL L. REV. 159 (1975).

state action exemption and the justified reluctance of the Supreme Court to extend fully its recognition of commercial speech as within first amendment protection. The Court's vague and evolving standards in both areas do not make vulnerable all state regulation which should be subject to scrutiny pursuant to antitrust policy. For example, state franchise legislation severely restricting vertical market relationships and termination of ongoing franchise relationships has been upheld against claims of unconstitutionality and federal antitrust preemption. Although legislative intervention in the franchise relationship to prevent fraud in inducing the relationship and to offset the inequality of bargaining power in maintaining or terminating the ongoing relationship may be justified on some ultimate economic and social scale of accounting, the degree of state intervention and the details of how it is accomplished have significant market implications.[128] The adoption and ongoing evolution of state franchise legislation, largely immune from federal antitrust supervision, should be evaluated from a state antitrust perspective to insure that such laws do not unduly interfere with long run marketing efficiencies by freezing in place existing methods or patterns of distribution.

Activity clearly or arguably within the state action exemption from federal antitrust, by virtue of its being compelled by a state agency acting within its "sovereign" capacity or a political subdivision exercising sovereign powers, may still be found to conflict with state antitrust policy. Absent the concerns of federalism and vestigial federal court fears of a rebirth of substantive due process, many state and local regulatory activities could be analyzed by state enforcement officials and state courts in terms of primary jurisdiction notions much like the process developed at the federal level. Thus, even where federal courts may find state action immunity for federal antitrust purposes,[129] the same activity viewed from a state antitrust perspective may not be immune from state antitrust policy absent a showing of a legislative intention to vest primary jurisdiction in a state or local regulatory authority and then only to the extent necessary to achieve the regulatory goal. By developing and applying a primary jurisdiction jurisprudence at the state level in state courts, state antitrust policy may fill an important role in confining and limiting state and local regulation beyond that presently available under the federal antitrust laws because of the broader and different meaning for the state action exemption from federal antitrust policy.

---

128. Recently, challenges have been mounted against state franchise legislation on preemption and commerce clause grounds. *See* Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978); New Motor Vehicle Board v. Orrin W. Fox Co., 99 S. Ct. 403 (1978). The Court's opinions indicate wide constitutional deference will be given state franchising legislation and many states have been actively engaged in wide ranging franchising legislation. *See* Note, *Regulation of Franchising*, 59 MINN. L. REV. 1027 (1975). Some of this legislation is of concern to antitrust enforcement officials, since it appears to be designed to protect competitors—not competition—and to freeze existing modes of distribution. See Shenefield, *Testimony Concerning Retail Marketing Divorcement And Divestiture Legislation Before The General Laws Committee Of The Virginia House of Delegates* (Jan. 18, 1979) (mimeo).

129. *See, e.g.*, Mobilfone of Northeastern Pa., Inc. v. Commonwealth Tel. Co., 571 F.2d 141, 148 (3d Cir. 1978).

By the same token the Court's evolving doctrine of "commercial speech," regardless of its ultimate wisdom and merit as a desirable and logical implementation of first amendment rights, does not jeopardize all state and local regulation of "commercial speech" that ought to be called into question from either a common sense or neo-classical economic point of view. For example, in its most recent commercial speech case, *Friedman v. Rogers*,[130] the Court upheld a Texas statute establishing the Texas Optometry Board with four of the six positions on the Board limited to members of a trade association of solo practitioners. The Texas statute also prohibited the practice of optometry under an assumed name, trade name or corporate name. The Court upheld the prohibition on practicing optometry under a trade name, finding that the plaintiff's reliance on *Virginia Pharmacy Board* and *Bates* was "misplaced." Stressing a difference between "commercial speech" and other "speech" within the first amendment, the Court held the use of trade names in connection with the practice of optometry "is a form of commercial speech and nothing more" and, unlike price advertising, it is a form of commercial speech "that has no intrinsic meaning."[131] Finding that a trade name only acquires meaning over a period of time by association in the public mind between the name and some standards of price and quality and that such information can be unfairly manipulated by users of trade names, the majority concluded "there is a significant possibility that trade names will be used to mislead the public."[132] The *possibility* of deception in the use of trade names was sufficient to sustain the validity of the total prohibition of practicing optometry under trade names, particularly in light of the freedom to advertise services and prices otherwise. At precisely what point *Friedman* leaves "commercial speech" is difficult to assay, other than to suggest that it may signal a retreat from the broader first amendment implications of *Virginia Pharmacy Board* and *Bates* and wider latitude for anticompetitive state and local prohibitions upon advertising by trades and professions should there be a potential for deception lurking in the vicinity. State antitrust analysis of proposals to implement or the operation of restrictions like those in *Friedman* provides a clearer basis from which to assess the wisdom, necessity, and manner of regulation. The economic and social interests in dissemination of commercial information, the risks of consumer deception, less restrictive alternatives and the degree to which advertising restrictions are primarily for the benefit of the proponents of regulation rather than in the broader public interest can all be more rationally measured in light of state antitrust policy than some yet to be identified first amendment value which is being protected by restricting government regulation of advertising. An active state antitrust enforcement program questioning the legislative, administrative and judicial implementation of advertising restrictions will not only serve to minimize first amendment liti-

130. 47 U.S.L.W. 4151 (Feb. 21, 1979).
131. *Id.* at 4154.
132. *Id.*

gation like *Friedman*, but also will provide a more rational platform from which to assess the competing policy claims for and against the regulation proposed prior to the adoption of that regulation, and may frequently point the way to the adoption of less restrictive means to achieve legitimate regulatory goals while maximizing competition.

A final reason for allocating a substantial portion of state antitrust enforcement resources to questioning the adoption, implementation and ongoing existence of all state and local regulation, is the contribution antitrust policy can serve in more clearly identifying, defining, and preserving the regulation a state may wish to adopt even though it may be contrary to a neo-classical model of economic theorizing. Short of imposing undue burdens on, or discriminating against, interstate commerce or running afoul of the supremacy clause by colliding with a clearly expressed national policy imposed by Congress,[133] there would still appear to be long-run values in permitting states to serve as laboratories for social and economic experiments, to choose different means for ordering economic life within the state, and to have sufficient freedom to address unique local problems or significant local industries and trades in ways which differ from policies adopted by other states or the federal government. Although there would appear to be substantial uniformity in the national ideology favoring a model of neo-classical *liassez-faire* and expansion of that ideology by the deregulation movement, it is well to remember that the policy of *liassez-faire* is still only an ideology.[134] Moreover, it is an ideology that may not serve all industries, circumstances, or perceptions of what is in the public interest at a particular time or place or the long-run needs of a society. At the very time there is a rising tide of sentiment for "deregulation" of many industries traditionally subject to regulation of entry prices and/or output,[135] there has also been a growing awareness of conditions which may require consideration of regulation of other activity if the broader public interest is to be served. Environmental pollution, energy and raw materials shortages, uncontrolled inflation, and unfair economic exploitation through franchising schemes are only a few phenomena that might only be solved by varying degrees of affirmative regulation by government. In order to define clearly the objectives sought to be resolved by regulation, the validity and propriety of the means chosen to do so, and the coherence of the scheme adopted with the prevail-

133. *See* Flood v. Kuhn, 407 U.S. 258, 284-85 (1972) (state antitrust regulation of baseball preempted by judicial exemption of baseball from federal antitrust regulation); Schevegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, *reh. denied*, 341 U.S. 956 (1951) (fair trade nonsinger clause invalidated).

134. *See* Austin, *The Emergence of Societal Antitrust*, 47 N.Y.U.L. REV. 903 (1972); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); Symposium, *Antitrust Jurisprudence: A Symposium on The Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977).

135. The most recent manifestation and summary of the deregulation movement is reflected in the NCRLAP Report, *supra* note 10, at chs. 9-15 (1979). *See also* PROMOTING COMPETITION IN REGULATED MARKETS (Phillips ed. 1975); Turner, *The Scope of Antitrust and Other Regulatory Policies*, 82 HARV. L. REV. 1207 (1969).

ing ideology favoring competition, an active state antitrust presence and surveillance at all stages of adopting and implementing affirmative regulation is essential. Although it may seem paradoxical, an activist implementation of antitrust policy in the adoption and implementation of a regulatory process serves to foster and protect that regulation adopted by assuring that the use of affirmative regulation through state or local intervention in the market is rationally related to a legitimate and clearly defined state goal and that the means chosen to reach that goal are no more restrictive than necessary.

III. CONCLUSION

There are several avenues by which a more active state antitrust presence may be created in state and local regulatory schemes. Considerable authority to do so may be inherent in the office of Attorney General since in many states the Attorney General is the chief legal officer for all or most state agencies.[136] In addition, many states have adopted broad "sunset legislation" requiring the periodic review of many state agencies with a view not only to their ongoing operations but with a view to whether they are necessary at all.[137] State antitrust enforcement policy can obviously be brought to bear on questioning the scope and operation of regulation through either of these avenues where they are available within a particular state. A third way in which needed antitrust input may be injected into the decision to regulate and the operation of regulation once in place is to encourage development of a state standard of primary jurisdiction and a role for antitrust enforcement personnel as participants in the legislative, regulatory and litigation processes where potentially anticompetitive regulatory activity is proposed or initiated.

Substantial precedent exists at the federal level analyzing the interface of antitrust policy and diverse schemes of affirmative federal regulation.[138] An express exemption from antitrust policy facilitates, but does not necessarily end, primary jurisdiction analysis. The scope of the exemption may not include the activity in question,[139] or may only indicate an intent to postpone antitrust analysis,[140] or include antitrust analysis in the regulatory agency's standard for judging the propriety of the activity involved.[141] In the absence of an express statutory exemption for the conduct in question,

136. *See generally* NATIONAL ASSOCIATION ATTORNEYS GENERAL, THE OFFICE OF ATTORNEY GENERAL 28 (1971).

137. For a recent survey see Price, *Sunset Legislation In The United States*, 30 BAYLOR L. REV. 401 (1978). The North Carolina Attorney General has announced a review of the State's occupational licensing boards in conjunction with implementation of the State's Sunset Law. The review is designed "to provide each board with a comprehensive study which will report any procedures which violate constitutional, antitrust or consumer protection provisions and recommend means of correcting these deficiencies." 5 NAAG ANTITRUST BULLETIN, Oct. 12, 1978, at 9.

138. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 19 (Supp. 1970); Shuman, *The Application of the Antitrust Laws to Regulated Industries*, 44 TENN. L. REV. 1 (1976).

139. California v. F.P.C., 369 U.S. 482 (1962); United States v. Borden Co., 308 U.S. 188 (1939).

140. Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973).

141. United States Lines v. Federal Maritime Comm'n, 584 F.2d 519 (D.C. Cir. 1978); Seatrain Int'l

the issue becomes whether an exemption should be implied to make the scheme of regulation work;[142] with an ongoing presumption in favor of competition[143] and a policy of limiting that regulation found necessary to the least restrictive alternative.[144]

While a full consideration of the primary jurisdiction question is beyond the scope of this article, a convenient generalization of the policy which can serve as a framework for state antitrust evaluation of proposals for or existing programs of state regulation is the proposed Competition Improvements Act.[145] The proposal would establish a general statutory definition of primary jurisdiction at the federal level to be applied by federal regulatory agencies in their decision-making. Although a federal proposal meant for federal regulatory agencies, the bill can also provide a useful yardstick by which state antitrust enforcers may begin to evaluate state regulation or cause state agencies with primary jurisdiction over specific activity to give competition its just due in determining whether and how to regulate. The heart of the bill provides:

> Notwithstanding any other provision of law, no Federal agency shall take any action, the effect of which may be substantially to lessen competition, or tend to create a monopoly, or to create or maintain a situation involving a significant burden on competition, unless it finds that—
>
> (1) Such action is necessary to accomplish an overriding statutory purpose of the agency;
>
> (2) The anticompetitive effects of such action are clearly outweighed by significant and demonstrable benefits to the general public; and
>
> (3) The objectives of the action and the overriding statutory purpose cannot be accomplished in substantial part by alternative means having lesser anticompetitive effects.[146]

With an amendment substituting "state" for "federal" agency, were this standard adopted, as the working philosophy of a state antitrust enforcement program concerned in part with state and local regulation, significant progress could be made in beginning the reform of state and local regulation as well as slowing the inexorable accretion to that regulation now in place.

---

v. Federal Maritime Comm'n, 584 F.2d 546 (D.C. Cir. 1978); Northern Natural Gas Co. v. F.P.C., 399 F.2d 953 (D.C. Cir. 1968).

142. Gordon v. New York Stock Exch., 422 U.S. 659 (1975); United States v. National Ass'n of Sec. Dealers, 422 U.S. 694 (1975).

143. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Home Box Office, Inc. v. F.C.C., 587 F.2d 1248 (D.C. Cir. 1978).

144. Silver v. New York Stock Exch., 373 U.S. 341 (1963); Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967).

145. S. 2028, 94th Cong., 1st Sess. (1976). *See The Competition Improvements Act of 1975: Hearings on S. 2028 Before the Subcomm. on Antitrust & Monopoly of the House Comm. On The Judiciary*, 94th Cong., 1st Sess. (1975-76). The proposal is favorably discussed and recommended in the NCRLAP Report, *supra* note 10, ch. 15.

146. *Competition Improvements Act, supra* note 145, § 3(a).

The dramatic increase in state antitrust enforcement activity is only dramatic in comparison to the general absence of state enforcement heretofore. The increase in state antitrust enforcement resources is not so dramatic when compared to the kinds of antitrust litigation states may find themselves involved with and the apparently widespread prevalence of anticompetitive local activities potentially subject to state antitrust enforcement. Once a state antitrust enforcement program has been established and institutionalized, its major problem is how best to allocate extremely limited enforcement resources. Pursuit of treble damage recoveries for the state and its subdivisions and prosecution of clear-cut local restraints of trade appear to be the primary areas where most states are presently allocating their major enforcement efforts.

However, as the recent "state action" and "commercial speech" cases under federal law serve to indicate, there is a vast and significant area of growing antitrust concern in addition to state treble damage litigation and state prosecution of local restraints. That area of concern is state and local regulation of economic activity, a little noticed but economically as well as socially significant area of anticompetitive restraints which ought to be among the primary concerns for state antitrust enforcement. The use of federal law to do so has proven to be an obtuse, clumsy, and controversial development which might well have not taken place or have been believed necessary were state antitrust laws vigorously enforced in the context of state regulation. Allocation of a significant portion of state antitrust enforcement efforts to the prevention or elimination of unwise, outmoded or abused state and local regulation may be expected to pay major dividends to consumers and businesses subject to, or victimized by, unnecessary regulation, as well as strengthen regulation where it is both necessary and responsibly implemented. A not insignificant additional benefit may well be a curbing of the flow of bad cases providing grist for the Burger Court's mill further limiting the scope of state action immunity from federal antitrust attack and the Court's expansion of questionable doctrines like a first amendment right of "commercial speech." The latter goal alone is worth the effort to give state antitrust enforcement a new and added responsibility to actively question the adoption, implementation, and ongoing necessity for anticompetitive state and local regulation.